IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL APPEAL NO.564 OF 2001

Birappa Basappa Jawale)
Yerawada Central Prison,)
Pune - 411 006.).. Appellant
(Org.Accused)

Versus

The State of Maharashtra).. Respondent

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Ms Daksha M.Shah for the appellant.

Smt.V.R.Bhonsale, APP for the State-Respondent.

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CORAM : N.V.DABHOLKAR &
SMT.V.K.TAHILRAMANI, JJ

DATED : 20TH FEBRUARY, 2006

ORAL JUDGMENT : (PER N.V.DABHOLKAR, J)

1. The present appellant was accused in Sessions Case No.31 of 2000. He was charged for the offence of committing murder of his wife Mangala. At the conclusion of the trial Court, the learned Sessions Judge, Solapur, was pleased to hold him guilty and sentence him to suffer life imprisonment. Feeling aggrieved by the said finding of guilty, conviction and sentence flowing therefrom, the present appellant is before this Court.

2. According to the prosecution, the incident in question took place on 3rd November, 1999 at about 16.30 hours at Gat No.101/1a of Mouje Kandalgaon, Taluka- South Solapur, District - Solapur. The accused was married to victim Mangala about 10 years ago. In fact, Mangala was his second wife, after the death of first wife. The accused already had two children viz. Mahananda and Basavraj, out of the wedlock of first. The accused and Mangala were gifted two sons, viz. Hanumant and Laxman. Matrimonial life of the accused and Mangala was continued properly for about three years. It is said that, thereafter, the accused started ill-treating Mangala, on account of suspicion about her character. He used to beat her consuming liquor. Mangala was subjected to physical torture. This was informed by Mangala to her parents. Since such incident occurred 7 to 8 times, Mangala left her husband (village-Rajur), and shifted to Kandalgaon, the place of her parents. This was prior to one year of this alleged incident. Thereafter, Birappa followed Mangala after six months, he assured the parents of Mangala, that he will treat her properly and thereafter, he also settled at Village Kandalgaon. The couple was residing at village Kandalgaon in the house of Tipanna Malappa Banne, presumably, on rent.

. The incident in question took place on 3rd November, 1999 at about 4.15 or 4.30 p.m. in the agricultural land, owned by Siddheshwar Gurubal Nimfode, which was reported to PW 4 Pandurang (brother of the deceased), who lodged complaint (Exhibit-22) with Mandru Police Station, and investigation was carried out by Madhukar Shinde, then PSI attached to said Mandru Police Station. After usual procedure of filing of charge sheet and committal, the case ended in conviction, as above.

3. The prosecution has examined as many as 15 witnesses in this case, wherein, it does not have any direct evidence. The case is wholly based on circumstantial evidence. While narrating the prosecution story, we have already referred to couple of witnesses. PW 4 Pandurang is brother of the victim, and his evidence is important regarding background of the matrimonial life of the accused and the victim. He has no personal knowledge of the incident. According to him, he was informed by Gaurabai about his sister being beaten by the accused and thereafter, he went to the location, ascertained the death of his sister and reported the matter to the police. We have also referred to Investigating Officer (PW 15) Madhukar Sinde.

. The prosecution has relied upon the evidence of PWs 5, 6, 8, 9 and 12 to prepare a network around the accused and demonstrate that the accused and the victim were working in the agricultural lands, on the day of incident, although, under different employers, they were working in the adjacent fields. In the afternoon, the accused had left message for his wife that she should come to the land of his master and collect some fire woods/sticks collected by him, while returning home. Accordingly, the victim went to the field, owned by the accused's master, at the end of the day, and she was found dead in the sugarcane crop of the accused's master. The evidence of five witnesses is utilised for that purpose. PW 5 Basavraj Nimfode is the Master of accused. According to Basavraj, on the date of incident, accused had resumed duties and started ploughing operations. At about 10 a.m., the accused had sought leave for a short period, because he had some work at village Kandalgaon, and accused had left by leaving the plough to the care of PW 5 Basavraj. The accused had returned at noon, before which Master had returned to farm house with the bullocks and plough. At that time, the Master directed the accused to resume ploughing operations. Accused accordingly went to the field with bullocks and implements. But when the Master took a round of the field at about 4.15 p.m.,

the accused was not seen ploughing the field. It is also the claim of Basavraj, that between 1.00 p.m. to 2.00 p.m., the accused had gone towards the field of Mallikarjun Gurusidhappa Patil (PW 9). It was Basavraj, who found the dead body when he just tried to check whether sugarcane plantation was properly irrigated, and this was seen after 4.15 p.m., because, according to Basavraj, he went to the field in order to check whether the accused is continuing with ploughing operation at about 4.15 p.m.

. PW 6 Bhau Rathod is an Agricultural Labourer, serving under Ramchandra Nimfode. According to him, the lands of the owner of Birappa and the land in which he was working, are also adjacent to each other. On the day of incident, both of them had enjoyed betel leaves together, at about 1.00 p.m. whereafter, they started for their respective work. At about 4.00 p.m., Bhau (PW 6) had seen the victim Mangala proceeding in the direction of her husband. Sometime, thereafter, Bhau (PW6) heard the shouts of PW 5 Basavraj, and when he went to the location, he saw dead body of Mangalabai in the sugar cane field of Basavraj.

. PW 9 Mallikarjun Gurusidhappa Patil is Master, in whose field the deceased Mangalabai was

working. According to Mallikarjun, on the day of incident, while Mangalabai was working in his field at about 12 noon, the accused had been to his field where Mangala was working, and he had also some talk with Mangala, whereafter, the accused returned to the field of Siddheshwar Nimfode. Mallikarjun had also deposed that at about 4.00 p.m., when all female workers stopped the work for the day and proceeded for their residence, Mangala had proceeded towards the field of Siddheshwar Nimfode, where her husband was working. After sometime, since then, he heard weeping and then learnt about the death of Mangala in the field of Siddheshwar.

. P.W.12 Tippabai Shantappa Surgale, whose narration in Kannad was interpreted to the Court by PW 11 Shashikant Machale, has deposed, that she was co-worker of the victim. She had seen the victim going towards the field where her husband was employed, at the end of the day, when Tippabai proceeded for her residence. She also claims that, as informed by the victim, the victim was called by the accused to the field where the accused was working, at the end of the day.

. According to PW 8 Anandrao Patil, the land of Mallikarjun Patil is to the East of his land and

beyond that, there is a land of Siddheshwar Nimfode. Thus, it appears that the Master of accused had his lands towards East of the land of the victim's Master. Anandrao Patil deposed to have seen the accused at about 5.00 p.m. when he was walking through the water canals prepared for the purpose of irrigating the crops and the accused was proceeding from East to West i.e. from the field of his own Master, the accused was departing towards the West.

. PW 7 Nagnath Nimfode can also be added to this list, but the evidence of Nagnath is not much weighty evidence. Nagnath had convulged to the location after hearing shouts of Basavraj and he had seen dead body of Mangalabai with multiple injuries on her face.

. There are four panch witnesses on record. PW 1 Shankar Gadekar had attended the inquest (Exhibit-15) and drawing of spot panchanama, together with seizure of certain articles from the location which is at (Exhibit-16). Both these parts of investigation were carried on 4th November, 1999. The panch, Abdul Kadir Shaikh (PW2), was present while panchnama (Exhibit-18) was drawn. The arrest of accused was effected and clothes then worn by him were seized. This panchanama records that there were

no marks of injuries on the person of the accused, at that time.

. The panch Mallapa Kore (WP 14) is also examined for the purpose of proving seizure of articles from the spot, as the spot panchanama (Exhibit-16) was drawn in his presence.

. Rajendra Umberje (PW 3) is the fourth and last panch witness on record. He claims to have witnessed the proceedings regarding memorandum of statement by the accused and discovery of weapon at the instance of information given by the accused. The proceedings took place on 4th November, 1999 and were recorded vide Exhibits 20 and 21.

. PW 13, Police Constable, Ramchandra Rathod had collected the muddemal property and delivered the same to the forensic science laboratory for the purpose of analysis.

. The remaining witness on record, Dr.Vijay Upase (PW 10) had carried out the post-mortem on the dead body of Mangala. He had noticed five incised injuries on the person of the deceased Mangala, and he has recorded the cause of the death in the post-mortem notes (Exhibit-32) as "shock due to

injury to brain."

4. So far as the defence of the accused is concerned, the same is of total denial. In his statement under Section 313 of the Code of Criminal Procedure, 1973, he admitted his marriage with Mangala about 10 years ago, and their cohabitation at the village- Rajur till both the sons were born. All other questions are answered by saying "it is not correct." At the conclusion of the statement under Section 313 of the Code of Criminal Procedure, 1973, the accused expressed his desire to file written statement and the written statement filed by him has remained in the miscellaneous file unexhibited. We have referred to the same, but even this written statement does not disclose any positive defence. He has denied to have killed his wife. He has denied to have ever suspected of character of his wife. He claims that all the witnesses, on suspicion, have deposed against him. According to him, his in-laws were angry with him, because, he did not shift to Kandalgaon. Hence, he had shifted to the village Kandalgaon to fulfill their wishes. He also claims that he had not absconded but he was taken into custody by the police on the day of incident itself. It must be said that inspite of filing of the written statement, except the pleading ignorance and denial,

the accused has not raised any positive plea.

5. We have heard Ms Daksha Shah, learned counsel for the appellant and the learned APP Smt.V.R.Bhonsale for the respondent-State. Learned counsel has taken us through the evidence as also the major portion of the reasons recorded by the trial Judge.

. As can be seen from the impugned judgment, for the reasons discussed in paragraphs 16 and 17, which mainly contained the medical evidence on record, the learned trial Judge arrived at a conclusion that the death of Mangala was homicidal. After taking a note of the fact that the case is based on the circumstantial evidence, and legal position regarding requirement of standard of proof in such cases by referring to certain judicial pronouncements of the Supreme Court, the learned trial Judge arrived at a conclusion that following set of circumstances is firmly established on record, and according to the learned Judge, those circumstances when considered together, established beyond the reasonable doubt that the accused has committed murder of his wife Mangala. We may enlist the circumstances relied upon by the learned trial Judge, hereinbelow.

(i) The couple had shifted to the place of victim within one year preceding the alleged incident, one after another;

(ii) Accused used to beat the deceased wife by suspecting her character and even after shifting to Kandalgaon, there was no improvement on this aspect;

(iii) On the day of incident, both the spouses had proceeded for agricultural work in the lands of their respective Masters, and although, they were serving under different Masters, the lands were adjacent to each other;

(iv) In the noon, the accused had asked the victim to come to his field and take away the fire sticks collected by him;

(v) The victim Mangala, at the end of the day, and after finishing her

work, had proceeded towards the accused;

(vi) Master of the accused, viz. Basavraj, found that the accused was absent, and was not operating the plough at about 4.15 p.m., - immediately thereafter, he found dead body of Mangala in the sugarcane crop;

(vii) At about 5.00 p.m., the accused was found departing from the location by PW 9;

(viii) The victim was lastly seen in the company of the accused;

(ix) Thereafter, the accused was absconding till 6th November, 1999;

(x) The weapon axe was discovered at the instance of information given by the accused;

(xi) On considering the report of the

analyser, the weapon as well as pyjama of the accused were found stained with human blood of group "B";

(xii) Motive; and

(xiii) False plea raised by the accused.

. In paragraphs 25 to 29, the learned Judge has referred to the witnesses, whose deposition, according to the learned trial Judge, establishes the circumstances enlisted hereinabove.

6. At the outset, we may say that the circumstances referred at Sr.Nos.8, 9 and 13 in the list above, do not have any foundation in the prosecution evidence. Although, it is the case of the prosectuion that the accused had approached his wife at about 12 noon, and asked her to come to the land where he was working and collect the fire sticks collected by him, that cannot be said to be the evidence of last seen together. This is because, admittedly, the victim continued to work in the field of her Master even in the afternoon. The observation by the trial Judge in paragraph 24, while enlisting

the circumstances that "the accused was found lastly in the company of deceased", is not borne out by any evidence on record. In fact, the prosecution has tried to complete web around the accused by demonstrating that soon before and soon after the time of incident, the accused was around the location where the dead body was found.

. About the accused absconding till 6th November, 1999, learned counsel Ms Daksha Shah has taken us through the evidence of Investigating Officer. He simply deposed about the arrest of accused on 6th November, 1999 (incident occurred on 3rd November, 1999), but the Investigating Officer has nowhere said that the accused had absconded. The only statement that " even on that day, I took search for the accused" probably is inferred by the learned trial Judge, as abscondence of the accused.

. Although the learned trial Judge has observed that the accused has raised a false plea (paragraphs 29, 24 and 25 of the judgment), the learned trial Judge has not discussed the false plea at length. Nodoubt, it is settled legal position that the false plea raised by the accused can form last ring in the chain of circumstantial evidence, if other evidence forms a complete chain, false plea raised by the

accused gives assurance to the prosecution story, when such plea is exposed to be false. As discussed earlier, we do not find accused having raised any positive plea. He has claimed either ignorance or denial about the killing of his wife. We, therefore, are unable to concur with the finding of the learned trial Judge that the accused has raised any false plea and that can be one more additional circumstance.

. The submission of learned counsel for the appellant, that the circumstances at Sr.Nos.8, 9 and 13 in the list above are not established, will have to be upheld.

7. While taking us through the evidence, learned counsel for the appellant has raised four more objections against reliability of the prosecution evidence. According to her, children of the accused born out of earlier wedlock could have been examined in order to bring on record that there was absence of harmony in the matrimonial life of the accused and the victim, on account of accused having suspicion about her character. The children are said to be of the age of 15 and 11 years and they could have supported the story of the prosecution regarding ill-treatment by the accused to Mangala. Since the

children are not examined, learned counsel for the appellant desires us to draw an adverse inference. We are unable to agree with the learned counsel for the appellant for the simple reason, that the grown up children of the accused are not born to the deceased Mangala. They are his children out of earlier wedlock and we do not expect those children to depose against their father.

. While reading the evidence of the complainant Pandurang (PW 4), a reference, as appeared, shows that he was informed about the incident by one Gaurabai. Ms Daksha Shah, learned counsel for the appellant was critical, because, this Gaurabai was not examined. The point stands clarified when we refer to the evidence of PW 5 Basavraj. According to Basavraj, he had informed about the incident to Gaurabai. Thus, the impression of learned counsel that Gaurabai was the person who was first to reach the location of incident cannot be upheld, and if this position is taken into account that Gaurabai was not the first to reach, no adverse inference need be drawn against the prosecution for non-examination of Gaurabai.

. Learned counsel Ms Daksha has also referred to the cross-examination of PW 12, Tippabai, who was

colleague of the deceased on the alleged day. Tippabai has admitted in her cross-examination as follows:-

> "It is correct that today for the first time I am deposing in Court about the husband of Mangalabai had been in the field of Mallikarjun Patil at about noon time, before that I have not stated in that respect to anybody."

According to learned counsel Ms Daksha, the crucial part of Tippabai is thus at the cost of improvement over and above the statement under Section 161, and therefore, is required to be disbelieved. The evidence of Tippabai is utilised by the prosecution for the purpose of establishing the fact that the accused had invited the victim at the location where the dead body was found. Tippabai has, thus, deposed in her chief-examination that :-

> "the husband of Mangala had been to the field of Mallikarjun Patil to inform her to come near the sugar cane crop of Siddhu Nimfode for taking firewood, he has collected there, and further informed her, that after completing her labour work, she should come

there. This is told by Mangalabai to me."

. From the terminal clause, it is evident that visit of the husband and message given by the husband are the knowledge of Tippabai, as learnt as a result of narration by Mangalabai to her. That does not necessarily demonstrate, that Tippabai had seen the husband talking with Mangala. Otherwise also, the prosecution has evidence on record to establish the visit of accused to Mangala on that noon in the form of deposition of PW 9 Mallikarjun, in whose land Mangala was working. PW9 Mallikarjun has specifically stated that at about 12 noon, the accused had been to his field where Mangala was working, and he then had some talk with his wife Mangala.

. The knowledge, which Tippabai claims on the basis of narration of Mangala, although hearsay, so far as the message given by the husband to the wife, the same would be admissible in evidence in view of Section 8 of the Indian Evidence Act, which admits on record the evidence regarding the conduct of any person, an offence against whom is subject of any proceeding as relevant, if such conduct influences or is influenced by any fact in issue. The victim, at the conclusion of the day, had proceeded towards her

husband, as per the message, which was her conduct, as influenced by the message of the husband. It is also narration pertaining to the preparation by accused, by the victim to the witness Tippabai. The evidence of Tippabai regarding conversation between the accused and the victim, as narrated to her by the victim, would, therefore, be admissible piece of evidence, although at first blush, one is inclined to feel the same to be hearsay and hence inadmissible.

8. Learned counsel for the appellant has also criticised the evidence in the form of report of chemical analyser. The trial Court has placed some reliance upon this evidence together with the evidence regarding discovery of axe at the instance of information by the accused and in presence of panch witness Rajendra Umberje (PW 3). We are not inclined to accept the argument of learned counsel Ms Daksha Shah, so far as she claimed that the discovery is meaningless, because, the same is discovered from the location accessible to all. We reject such challenge for the simple reason, that at material time, the sugarcane crop had already grown up to the height of 6 feet and the axe kept in such a crop, although location is accessible to all, could not have been discovered by others and anyone else, except the one, who had kept it at that location.

The challenge posed to the acceptance of analyser's report by learned counsel for the appellant is required to be upheld for couple of reasons. As rightly pointed out by her, in the panchanama (Exhibit-21), there is no reference to the broken handle of axe, whereas, during the course of recording of his evidence, when the axe was shown to him, he admitted that the axe had a broken handle. So far as the blood stains on the clothes of the accused, learned counsel for the appellant had taken us to the panchanama (Exhibit-18) proved by Abdul Kadir Shaikh (PW 2) and relied upon by the prosecution. The panchanama contains details regarding the clothes seized from the person of the accused. It was a shirt, pyjama and cap. None of these clothes are described of having any blood stains. Inspite of absence of blood stains or even absence of suspicion about presence of blood stains on the clothes, at the time when they were seized, the report of forensic science laboratory indicating that the pyjama is stained with human blood of group "B", is acceptable only with a pinch of salt. We are, therefore, willing to accept the submission of Ms Daksha, learned counsel for the appellant, that the prosecution has not been able to establish with firmness the requisite of a case, based on circumstantial evidence that the weapon discovered at

the instance of the accused and pyjama of the accused were having stains of human blood of Group "B", when discovered.

9. Although, the learned APP did not agree either of the statements of learned counsel for the appellant, she urged that even after substracting the circumstances which do not stand on firm footing, the remaining circumstances are still sufficient to bring home the guilt, and she has relied upon the following three bold circumstances which can be described as follows:-

1. Apparently, homicidal death (as per the medical evidence, the victim has suffered five incised injuries and all are located on the head;

2. Motive i.e. accused carrying suspicion about the character of his wife;

3. Accused had called the victim to the place of his working, after she completed her working hours;

4. Accused was seen at the location immediately before and immediately

after the incident and at the time of the incident, he was missing from his own working place.

. For the purpose of appreciating the submission of learned APP, we will be required to refer to the team of six witnesses, who were either present or working in the field, as the Master or as Agricultural Labourers. We have no hesitation to accept the submission that the medical evidence demonstrates that the death to be homicidal, because, as many as five incised injuries on the head, ordinarily cannot be result of accident or attempt to commit suicide.

. The evidence of PW 9 Mallikarjun, the Master of the victim, indicates that Mangala was approached by her husband at about 12 noon and the spouses had some talk. What must have been the talk between the spouses had come on record in the deposition of PW 12 Tippabai, and it has come in the most natural way, since Tippabai and the victim were working together, at the end of the day, ordinarily they would have returned home together. The narration by the victim to PW 12 Tippabai, as to what was the conversation between Mangala and husband, is, therefore, most natural. Tippabai has also pointed out that after

finishing the work, she returned to her house at Kandalgaon, while the victim Mangala proceeded towards sugar cane farm of Siddheshwar Nimfode (Master of the accused). It must be borne in mind that within half an hour whereafter, the dead body of Mangala was found in the sugarcane field of Siddheshwar. PW 6 Bhau confirms and strengthens the evidence of Mallikarjun and Tippabai. According to him, at about 4.00 p.m., he has seen the victim going towards her husband, i.e. accused, and after some time lapsed, he had heard shouts of PW 5 Basavraj and on reaching the location, he saw dead body of Mangala. The evidence of accused' Master Basavraj is useful. The accused sought his leave between 10.00 a.m. to 1.00 p.m. This is precisely the time when he was in conversation with his wife. According to Basavraj, when he took a round of the field, at about 4.15 p.m., the accused instead of operating plough, was missing from the field. This appears to be the time when the incident has taken place, because, Basavraj has seen the dead body soon thereafter, when he tried to ascertain proper irrigation of sugarcane crop. The evidence of these six witnesses, i.e. PWs 5 to 9 and PW 12, if considered together, certainly establishes on record that the deceased was hale and hearty on the alleged day, she had worked in the field of her Master for whole day and in the evening,

she had proceeded towards her husband working in the neighbouring field, instead of returning home in the village with other female co-workers. The evidence of these witnesses also demonstrate that the accused had some talk with wife at about 12 noon, and he had invited his wife in his field in the evening by pretending that he had collected some firewoods, which she should take home. Thus, the deceased was seen alive and healthy at about 4.00 p.m., when she had proceeded towards her husband, and she was seen dead in the field of her husband's Master, by the Master at about 5.00 p.m., at that time he was departing. Earlier to that, at about 4.15 p.m., the Master had found the accused missing instead of being busy in ploughing operation. All these circumstances considered cumulatively, certainly point out the finger towards the accused.

. The motive is deposed by PW 4 Pandurang and on reference to the written statement of the accused, the evidence of Pandurang stands supported. Admittedly, the accused had shifted to Kandalgaon, which is the place of parents of the victim. The accused himself does not have any reason to explain, except the insistence of in-laws. But the brother of the victim has narrated that Mangala had returned to her parents about one year prior to the incident and

this was because, she was tired of ill-treatment at the hands of the accused, and on the basis of suspicion about her character. The accused had followed Mangala to the village of in-laws, after a time gap of about six months. The evidence of brother Pandurang that the victim had narrated him stories of ill-treatment because of suspicion about her character, and, therefore, the couple shifted to the place of parents of the deceased is required to be accepted. We are aware that the accused is facing charge under Section 302 of Indian Penal Code, and it could have been argued by learned counsel for the appellant that the narration by the victim to the brother is not admissible in evidence. In the matter at hands, the narration by victim to the brother and more particularly, the cause for ill-treatment is the motive for killing. According to the prosecution, the stories regarding expression of suspicion about her character and ill-treatment by the husband, as narrated by victim Mangala to her brother, therefore, would be part and parcel of the transaction leading to the cause of death, and would be admissible in evidence since the cause of death of Mangala is fact in issue. That narration also would fit in the character of dying declaration under Section 32(1).

10. We are, therefore, convinced that although

the points raised by learned counsel for the appellant are upheld, and therefore, the prosecution is deprived of services of some circumstances held proved and relied upon by the learned trial Court, the remaining circumstances still stand against the accused. Those are established with firmness by relying upon the cogent and convincing evidence and those circumstances together bring home the guilt of the accused. Taking into consideration the suspicion that the accused was carrying in his mind about character of his wife, consequent shifting of the spouses to the place of wife, the wife and husband being on duty in the adjacent fields during the entire day, the husband desiring the wife to come to his place of working, the husband-accused being seen at a very close distance to the place where dead body was found, soon before and soon after the incident, are the circumstances which leave no other hypothesis possible. Even the accused has not been able to point out a finger of suspicion against any one regarding murder of his wife, not even by wild imagination.

11. For the reasons discussed above, although we have differed with the Trial Court on some findings, we are still inclined to maintain the finding of guilty and conviction so also the sentence imposed.

The appeal is, therefore, dismissed.

. The Registrar (Judicial) shall ensure supply of a certified copy of this judgment, free of costs; to the appellant through prison authorities.

. Advocate Ms D.M.Shah was appointed to conduct the appeal on behalf of the appellant-prisoner, at the costs of the State. We quantify her professional charges at Rs.2,500/-.

(V.K.TAHILRAMANI,J) (N.V.DABHOLKAR,J)